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OFFICE OF PETITIONS

In re Application of:
Whitman, et al. : ON PETITION
Filed: 30 August, 2001 :
Application No. 09/944,230 :
Docket No.:2269-4294.1US (98-102.01/US) :

This is a decision on the petition filed herein on 30 January, 2003, under 37 C.F.R. §1.137(a)¹ to revive the above-identified application, and in light of the allegations also considered as a request to withdraw the holding of abandonment under 37 C.F.R. §1.181.²

¹ A Petition filed under the provisions of 37 C.F.R. §1.137(a) must be accompanied by:

- (1) The required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application for patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof;
- (2) the petition fee required by 37 C.F.R. §1.17(l);
- (3) A showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the reply due date until the filing of a grantable petition pursuant to the is paragraph was unavoidable; and
- (4) Any terminal disclaimer (and fee set forth in 37 C.F.R. §1.20(d)) required pursuant to 37 C.F.R. §1.137(c).

An application is "unavoidably" abandoned only where Petitioner (or Petitioner's counsel) takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, the response is not timely received in the Office. That is, in the context of ordinary human affairs the test is such care as is generally used and observed by prudent and careful persons in relation to their most important business. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r. Pat. 1913).

² The regulations at 37 C.F.R. §1.181 provide, in pertinent part:

§1.181 Petition to the Commissioner.

(a) Petition may be taken to the Commissioner: (1) From any action or requirement of any examiner in the *ex parte* prosecution of an application which is not subject to appeal to the Board of Patent Appeals and Interferences or to the court; (2) In cases in which a statute or the rules specify that the matter is to be determined directly by or reviewed by the Commissioner; and (3) To invoke the supervisory authority of the Commissioner in appropriate circumstances. * * *

(b) Any such petition must contain a statement of the facts involved and the point or points to be reviewed and the action requested. Brief or memoranda, if any, in support thereof should accompany or be embodied in the petition; and where facts are to be proven, the proof in the form of affidavits or declaration (and exhibits, if any) must accompany the petition.

© When a petition is taken from an action or requirement of an examiner in the *ex parte* prosecution of an application, it may be required that there have been a proper request for reconsideration (§1.111) and a repeated action by the examiner. The examiner may be directed by the Commissioner to furnish a written statement, within a specified time, setting forth the reasons for his decision upon the matters averred in the petition, supplying a copy thereof to the petitioner.

(d) Where a fee is required for a petition to the Commissioner the appropriate section of this part will so indicate. If any required fee does not accompany the petition, the petition will be dismissed. * * *

(f) Except as otherwise provided in these rules, any such petition not filed within 2 months from the action complained of, may be dismissed as untimely. The mere filing of a petition will not stay the period for reply to an Examiner's action which may be running against an application, nor

For the reasons set forth below, the petition under:

- 37 C.F.R. §1.181 is **GRANTED**; and
- 37 C.F.R. §1.137(a) is **DISMISSED as moot**.

BACKGROUND

The record indicates that:

- it appeared that applicant failed to reply timely and properly to the non-final Office action mailed on 3 June, 2002, and due (absent extension of time) on or before 3 September, 2002;
- the application was deemed abandoned after midnight 3 September, 2002;
- Notice of Abandonment mailed on 24 January, 2003;
- Petitioner contends as his showing that he received no Notice, and Petitioner provides documentation (docket records or mail logs, file jacket, etc.) in support of the allegation.

The courts have determined the construct for properly supporting a petition seeking withdrawal of a holding of abandonment.³

CONCLUSION

Accordingly, the petition to:

- to withdraw the holding of abandonment as considered under 37 C.F.R. §1.181 must be and hereby is **granted**; and
- revive as to unavoidable delay under 37 C.F.R. §1.137(a) is **dismissed as moot**.

A copy of the 3 June, 2002, Office action is enclosed herewith, and Petitioner has three (3) months from the mail date of this decision within which to reply. (Extensions of time under 37 C.F.R. §1.136(a) are permitted.)

The petition fee (\$110.00) is waived and refunded via Treasury check.

act as a stay of other proceedings. * * *

³ See: Delgar v. Schulyer, 172 USPQ 513 (D.D.C. 1971).

The instant application is being forwarded to Technology Center 2800 for further processing upon Petitioner's submission of a timely and proper reply.

Telephone inquiries concerning this decision may be directed to the undersigned at (703) 305-9199.

A handwritten signature in black ink, appearing to be 'J. Gillon', written over a horizontal line.

John J. Gillon, Jr.
Senior Attorney
Office of Petitions